Office-Supreme Court, U. S.
FILED
SEP 12 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 317

THE DAY-BRITE LIGHTING, INC.,
Appellant,

vs.

STATE OF MISSOURI

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSOURI

STATEMENT OPPOSING JURISDICTION

J. E. TAYLOR,
Attorney General of Missouri,
ARTHUR M. O'KEEFE,
Assistant Attorney General of Missouri,
JOHN R. BATY,
Assistant Attorney General of Missouri,
Counsel for Appellees.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 317

STATE OF MISSOURI,

Appellee,

vs.

THE DAY-BRITE LIGHTING, INC.,

Appellant

STATEMENT OF SUGGESTIONS MAKING AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

(a)

Federal Questions Raised for the First Time on Appeal to the Supreme Court of the United States are Raised Too Late

The appellant, in paragraphs 4, 5, 6 and 7 of Paragraph V of its jurisdictional statement, raises for the first time certain federal constitutional objections. In Paragraph IX of the statement, appellant admits that these federal questions were raised "after the judgment of the Supreme Court of Missouri became final by its act of overruling appellant's motion for rehearing on the 11th day of July, 1951." It is well settled by this court that federal questions raised for

the first time in a petition for appeal are raised too late and that this court has no jurisdiction to determine the same. *Missouri Pacific R. Co.* v. *Hanna*, 266 U. S. 184; *Rogers* v. *Clark Iron Co.*, 217 U. S. 589; *Mallers* v. *Commercial Loan Investment Co.*, 216 U. S. 613.

There is further reason why paragraphs 4, 5, 6 and 7 of Paragraph V of the jurisdictional statement present nothing for review by this court and should not be considered. Paragraphs 4 and 5 allege that the judgment of the Supreme Court of Missouri in finding the appellant guilty of the violation of *Section* 129.060, *RSMo* 1949, deprived the appellant of its property without due process of law contrary to the provisions of the Fifth Amendment of the Constitution of the United States. It is a fundamental principle of constitutional law that the first eight amendments to the Constitution of the United States apply only to acts of Congress and do not apply to acts of the states. *Gaines* v. *Washington*, 277 U.S. 81; *Twining* v. *New Jersey*, 211 U.S. 78; *Hunter* v. *Pittsburg*, 207 U.S. 161.

Therefore, the appellant cannot here claim that a state statute deprives it of any rights under the Fifth Amendment to the Constitution of the United States.

In paragraph 6 of Paragraph V the appellant states that it was denied equal protection of the laws contrary to the provisions of the Fourteenth Amendment because the information filed in the cause did not state facts sufficient to accuse and convict the appellant. The decisions of this court are uniform in holding that the question of the sufficiency of an indictment or information is not a Federal question. *Barrington* v. *Missouri*, 205 U.S. 483; *In Re Robertson*, 156 U.S. 183; *Leeper* v. *Texas*, 139 U.S. 462.

Paragraph 7 of Paragraph V states that the judgment of the Supreme Court of Missouri denied appellant the

equal protection of the law contrary to the Fourteenth Amendment because the facts were insufficient to show that the appellant had violated the statute. This contention is answered by the statement in *Whitney* v. *California*, 274 U.S. 357, in which the court stated, l.c. 367:

> "This contention, while advanced in the form of a constitutional objection to the Act, is in effect nothing more than an effort to review the weight of the evidence for the purpose of showing that the defendant did not join and assist in organizing the Communist Labor Party of California with a knowledge of its unlawful character and purpose. This question, which is foreclosed by the verdict of the jury—sustained by the Court of Appeal over the specific objection that it was not supported by the evidence—is one of fact merely which is not open to review in this Court; involving as it does no constitutional question whatever."

In view of the above it would seem that the Federal questions which the appellant has attempted to raise in paragraphs 4, 5, 6 and 7 of Paragraph V of appellant's jurisdictional statement are raised too late and are so devoid of merit that the court is justified in declining jurisdiction of the appeal.

(b)

Appeal Should Be Dismissed Because There Is No Substantial Federal Question

An appeal to this Court will be dismissed if no substantial Federal question is raised by the appeal. *Manhattan Life Ins. Co. of New York* v. *Cohen*, 234 U.S. 123, 136, 137; *Campbell* v. *Olney*, 262 U.S. 352, 354; *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444, 455, 456; *Roe* v. *State of Kansas ex rel Smith*, 278 U.S. 191, 193.

As was held by Mr. Chief Justice White in *Equitable Life Insurance Society* v. *Brown*, 187 U.S. 308, 311, "The doctrine * * * is that although * * * it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy" the cause will be dismissed.

This case is an appeal from a conviction in which the appellant was adjudged to pay a fine of $100 for violation of a state statute making it a misdemeanor for any employer to refuse to permit an employee to absent himself from his employment without suffering any penalty or deduction of wages.

The appellant has sought to assail this legislation on various constitutional grounds, and now seeks to have this misdemeanor conviction reviewed by the United States Supreme Court.

It is appellee's contention that jurisdiction of this review should be denied on the grounds that there is no substantial Federal question.

Appellant contends that it has been denied the equal protection of the laws by the legislative enactment in question. A reading of the statute clearly shows that it is singularly free from the criticism leveled against it by this assignment. The statute applies with complete uniformity of duty and privilege, respectively, to all employers and to all employees. The United States Supreme Court has frequently recognized the special classification of the relation of employees and employers as proper and necessary for the welfare of the community and requiring special treatment. (*Truax* v. *Corrigan*, 257 U.S. 312, 338.)

Appellant also seeks to find a basis for jurisdiction of

this appeal by the assertion that the statute impairs the obligation of contract. At this point it is well to remember that this statute had been in effect for almost fifty years at the time that the contract between the employer and the union representing the employees was executed.

It has been recognized that freedom of contract is a qualified and not an absolute right. This power under the Constitution to restrict freedom of contract has had many illustrations. That it may be exercised in the public interest with respect to contracts between employer and employee is undeniable. Thus statutes have been sustained limiting employment in underground mines and smelters to eight hours a day; in limiting hours of work of employees in manufacturing establishments; and in maintaining workmen's compensation laws. In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion in order that there may be suitable protection of health and safety, and that peace and good order may be promoted through regulations designed to insure wholesome conditions of work and freedom from oppression. (*West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 392.)

The third main point relied on by appellant for jurisdictional purposes is that the statute is a denial of due process of law. This assertion is made in the face of repeated decisions of the United States Supreme Court holding, in effect, that state legislatures have not been placed in a legalistic strait jacket by the Fourteenth Amendment. Throughout this case there has been no question but that the statute was an enactment under the police power. In the case of *Nebbia* v. *New York*, 291 U.S. 502, this Court, speaking through Justice Holmes, said, l.c. 510:

> "In answering that question, we must be cautious about pressing the broad words of the 14th Amend-

ment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guaranties in the Bill of Rights. They more or less limit the liberty of the individual, or they diminish property to a certain extent. We have few scientifically certain criteria of legislation, and as it often is difficult to mark the line where what is called the police power of the states is limited by the Constitution of the United States, judges should be slow to read into the latter a *nolumus mutare* as against the lawmaking power.

"The substance of the plaintiff's argument is that the assessment takes private property for private use without compensation. * * * In the first place, it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. * * * And in the next, it would seem that there may be other cases beside the everyday one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See Ohio Oil Co. *v.* Indiana, 177 U.S. 190, 44 L. Ed. 729, 20 Sup. Ct. Rep. 576, 20 Mor. Min. Rep. 576. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said."

And, in the case of *Mountain Timber Co.* v. *State of Washington*, 243 U.S. 219, 238, the United States Supreme Court upheld the validity of the Workmen's Compensation Act of the State of Washington, stating as follows:

"As to the first point: The authority of the states to enact such laws as reasonably are deemed to be necessary to promote the health, safety, and general welfare of their people carries with it a wide range of judgment and discretion as to what matters are of sufficiently general importance to be subjected to state

regulation and administration. Lawton *v.* Steele, 152 U.S. 133, 136, 38 L. Ed. 385, 388, 14 Sup. Ct. Rep. 499. 'The police power of a state is as broad and plenary as its taxing power.' Kidd *v.* Pearson, 128 U.S. 1, 26, 32 L. Ed. 346, 352, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6. In Barbier *v.* Connolly, 113 U.S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, the court, by Mr. Justice Field, said: 'Neither the (14th) Amendment—broad and comprehensive as it is—nor any other Amendment, was designed to interfere with the power of the state sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity. * * *"

This Court has upheld the validity of minimum wage regulation in *West Coast Hotel Co.* v. *Parrish, supra.* The distribution of free textbooks to school children has been held not violative of constitutional provisions. *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370.

The applicable rule has been succinctly stated in *Miller* v. *Schoene*, 276 U.S. 272, 279:

"* * * And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property. * * *" (Citing cases.)

We have many decisions of the United States Supreme Court clearly setting forth the extent of the police power residing in the states. Abstractly considered, perhaps every enactment of a state legislature may be said to infringe upon some right guaranteed by the Constitutions, both State and Federal. However, when questions similar

to principle have been resolved so clearly against the person urging the unconstitutionality of legislation, it must be said that there is no substantial Federal question involved, and jurisdiction of this Court should be declined. (*Zucht* v. *King*, 260 U.S. 174, 176.)

(c)

The Appellant Has Not Sustained the Burden of Proof To Show Affirmatively That the Supreme Court Has Jurisdiction.

It is well settled that, upon application to this Court for review of a judgment of a state court, the burden is upon the appellant to show affirmatively that the Supreme Court of the United States has jurisdiction to hear and decide the cause. *Memphis Natural Gas Company* v. *Beeler*, 315 U.S. 649; *Gorman* v. *Washington University*, 316 U.S. 98.

In support of this appeal, appellant has set forth in its jurisdictional statement the grounds upon which it contends that the questions involved are Federal questions and are properly for review by the Supreme Court of the United States. To sustain this position the appellant has cited the court to five cases. However, it is strongly contended that these cases are not sufficiently in point to permit the appellant to satisfactorily show affirmatively the court's jurisdiction of the appeal. These cases cited by appellant are not sufficient to show that there is a substantial Federal question involved in the instant case in a jurisdictional sense.

It is appellee's contention that there is no substantial Federal question in this case, and we respectfully submit

that this Court should not accept jurisdiction of the appeal.

J. E. Taylor,
Attorney General of the State of Missouri,
Arthur M. O'Keefe,
Ass't Attorney General of the State of Missouri,
John R. Baty,
Ass't Attorney General of the State of Missouri,
Attorneys for Appellee.

(7121)